

The 1910 Collision Convention

Allocation of Liability (Art. 4)

United States

Otal Investments Limited v. United Services Automobile Association, and Others M.V. "Clary" and Others and M.V. "Tricolor", U.S. Court of Appeals-II Circ. 6 July 2007

Before dawn on December 14, 2002, three vessels, the M/V Kariba (the "Kariba"), the M/V Tricolor (the "Tricolor") and the M/V Clary (the "Clary") were navigating a Traffic Separation Scheme ("TSS") in international waters north of Dunkerque, France (in the English Channel). At the relevant point of the TSS, two branches intersect at approximately right angles, one branch cutting roughly North-South, the other roughly East-West. On the night in question, the fog was thick and visibility was low. The Kariba was proceeding westward at about 16 knots. The Tricolor was also proceeding westward at 17.9 knots, one-half mile to the starboard aft of the Kariba, and in the process of gradually overtaking her. At the same time, the Clary was moving northward, along the intersecting branch of the TSS, at 13 knots, on a collision course with the Kariba.

Noticing that it was on a collision course, the Clary planned to turn starboard and steer astern of the Kariba. Before the Clary began to turn, however, the Kariba initiated its own evasive manoeuvre. The Kariba, seeking to avoid a collision with the Clary – and perhaps unaware of the proximity of the Tricolor – made an abrupt turn to starboard. The Kariba struck the port side of the Tricolor, rending the Tricolor's hull below its bridge. The Tricolor along with its cargo then sank. There were no human casualties.

In the quarter-hour leading up to the collision, none of the vessels sounded its foghorn or communicated with any other vessel via radio.

In June 2003, Otal Investments, Ltd., the owner of the Kariba (hereinafter, Otal and the Kariba together the "Kariba"), filed a complaint in the Southern District of New York "seeking Exoneration from or Limitation of Liability." In response to this complaint, numerous claimants filed claims against the Kariba, seeking damages for the loss of their cargo, which had sunk along with the Tricolor (hereinafter, the claimants will be called the "cargo owners"). Meanwhile, the Kariba impleaded the Clary and the Tricolor as third-party defendants.

The Kariba and the cargo owners settled their disputes before trial, and the Tricolor agreed to resolve its disputes against the Kariba in Belgium. For the district court, this left only the disputes between the Kariba and the cargo owners, on the one side, and the Clary and the Tricolor, on the other. After a bench trial, the court ruled in favor of the Clary and the Tricolor, finding the Kariba to have been the sole cause of the collision.

All parties agreed the substantive law governing this case derived from treaties ratified by the vessels' flag states. Specifically, the navigational duties are contained in The International Regulations for Preventing Collisions at Sea (the "COLREGS"). In addition, the parties stipulated their claims should be adjudicated "in accordance with" the Brussels Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, 1910 (the "1910 Collision Convention").

The district court found the rule in *The Pennsylvania* did not apply in this case. "Generally," the court held, "United States courts will apply the 1910 Collision Convention when a collision occurs in international waters between vessels that fly flags of signatory states." In *re Otal Investments, Ltd.*,

2005 U.S. Dist. LEXIS 21580 at *6. Article 6 of that Convention states “[a]ll legal presumptions of fault in regard to liability for collision are abolished.” If the rule in *The Pennsylvania* is substantive, the court noted, Article 6 of the Convention would override it. *Id.* at *8.

Both the *Kariba* and the cargo owners appealed from this judgment, seeking a reversal of the district court’s determination that the *Kariba* was solely liable. The *Clary* and the *Tricolor* sought to preserve that decision.

Appellants the *Kariba* and cargo owners argued that while substantive law was governed by the 1910 Collision Convention, procedural law was governed by the law of the forum and that, therefore, the *Pennsylvania* Rule applied, since it its nature was procedural.

After deciding that the *Pennsylvania* Rule is substantive, the Court of Appeals considered the allocation of liability under the 1910 Collision Convention.

Held, by the U.S. Court of Appeal-II Circ., that:

[1] Article 4 of the 1910 Collision Convention, which allocates liability “in proportion to the degree of the faults respectively committed,” requires consideration of both culpability and causative effect.

Legal presumptions of fault (art. 6)

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(The summary of facts may be found in the section “Allocation of liability”)

Held, by the U.S. Court of Appeal-II Circ., that:

[1] The rule in The Pennsylvania is not a mere procedural rule; it is, instead, substantive. The question of whether a rule is procedural or substantive depends on its effect at trial. Under the rule in The Pennsylvania, a vessel that violates a navigational rule not only must show that her fault did not cause the collision, but also must persuade the court that her own explanation of the collision is correct. This is an imposing burden. It does not serve simply to determine who moves forward with the evidence, or to narrowly regulate the conduct at trial. To the contrary, the rule in The Pennsylvania is so significant as to substantially “affect the decision of the issue” of liability in a collision. Moreover, the purpose of the rule in The Pennsylvania extends beyond regulating evidentiary burdens at trial. As its author, Justice Strong, proclaimed, the rule “is necessary to enforce obedience to the mandate of the statute” (The Pennsylvania, 86 U.S. at 136), an aim that exceeds mere evidentiary concerns.

Time for suit (art. 7)

Hong Kong Special Administration Region

Chan Kwai Ha v. Wong Chick Bun, Court of Appeal 1 February 2008

In August 1999 Ms. Chan’s barge (the *Tow*) sank while being towed by Mr. Wong’s vessel (the *Tug*). In April 2005 Ms. Chan issued a writ against Mr. Wong claiming damages for the loss of the *Tow*. The writ alleged breach of contract on the part of Mr. Wong and/or negligent navigation and/or management of the *Tug*.

In his Defence, Mr. Wong contended that Ms. Chan's claim was time-barred by reason of Merchant Shipping (Collision Damage Liability and Salvage) Ordinance (Cap.508) section 7(1).

The High Court of Admiralty heard the time-bar question as a preliminary issue. It held that there was no good reason for extending the limitation of two years imposed by the Ordinance and that Ms. Chan was thus out of time in bringing her action. Ms. Chan appealed against this determination on the ground that, on its true construction, section 7(1) only applied to tortious claims and that the claim for breach of contract (arising from alleged negligence in navigation of the Tug) should therefore be allowed to proceed on the basis that the appropriate limitation period was 6 years (under the Limitation Ordinance (Cap. 347)).

Held, by the Court of Appeal, that

[1] There is nothing in Article 7 of the Collision Convention, 1910 to suggest that the "actions for the recovery of damages" mentioned in the Article are confined to tortious actions. On the contrary, the words are general. They indicate that all actions for recovery of damages in collision cases are barred after the lapse of two years from a casualty.

